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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

NEEDHAM PACKING COMPANY d/b/a SIOUX CITY DRESSED BEEF, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REPLY BRIEF FOR PETITIONER.

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STATEMENT OF THE CASE.

The "Statement of the Case" in Respondent's Brief (pp. 3-8) contains a section headed "2. The Walkout and Ensuing Strike" (Brief, pp. 5-7). To a considerable extent that section recites as undenied facts matters alleged in Respondent's Answer to Plaintiff's Amendment to Petition (R. 40-41). For the reasons set out fully in Point II of this Brief (*infra*, pp. 7-12), Petitioner does not believe that allegations of that pleading may be treated as admitted.

ARGUMENT.

I.

THE JUDGMENT BELOW IS A FINAL JUDGMENT WITHIN THE MEANING OF SECTION 1257 OF THE JUDICIAL CODE. THE SUPREME COURT OF IOWA RULED THAT PETITIONER WAIVED ITS RIGHT TO ARBITRATE BY ENGAGING IN A WALKOUT. THAT DECISION IS NOT SUBJECT TO FURTHER REVIEW IN ANY IOWA TRIBUNAL.

Respondent suggests that the Writ of Certiorari was improvidently granted (Brief, pp. 14-18). The arguments advanced are precisely the ones Respondent originally urged in its Brief in Opposition to the Petition (pp. 9-13). In essence, Respondent contends that when its counterclaim for breach of contract is determined, Petitioner *might* have "appropriate and available means to reopen in the Iowa courts the federal issue temporarily foreclosed by the January 15, 1963 decision of the Supreme Court of Iowa, i.e., that the union was barred from arbitrating the discharge of employees because of its sanction of and their participation in a walkout in violation of a no-strike clause" (Brief, pp. 16-17). Presumably, therefore, should Petitioner succeed at some indeterminate future time in utilizing an appropriate procedure for reopening the issue of its right to compel arbitration under Section 301 of the Labor-Management Relations Act, it *might* obtain relief in an Iowa court. On this view, arbitration *might* be ordered and *might* take place eventually. Given the probable lapse of time before any such event, however, it is far from clear that the policy of the Federal labor laws favoring arbitration would be served. Arbitra-

tion long delayed may be of no worth to anybody; it may not even have therapeutic value. Cf. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960).

The decisions relied upon by Respondent do not establish the non-finality of the judgment below. The test for determining whether a state court judgment is final is "a practical one." *Market Street Ry. Co.* v. *Railroad Com'n of California*, 324 U. S. 548, 552 (1945). Attempting to classify what the Supreme Court of Iowa did as in some way interlocutory does not preclude its being final for purposes of Section 1257. Viewed realistically, the judgment below foreclosed the possibility of Petitioner's compelling arbitration by its proceeding in the Iowa courts. As to that issue "there is nothing more to be decided." *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382 (1953); *Clark* v. *Willard*, 292 U. S. 112, 118 (1934). Petitioner, at this point, can do nothing in the Iowa courts which will affect or alter their determination that it waived its right to arbitrate. The possibility that, on a trial of Respondent's counterclaim, a result might be reached which could lead to a reopening of the petition to compel arbitration does not affect finality for present purposes. Cf. *Largent* v. *Texas*, 318 U. S. 418, 421-22 (1943).

Respondent's argument that "an evidentiary hearing on the counterclaim will turn upon issues intimately related to the decision" now before this Court (Brief, p. 18), far from being a reason for requiring Petitioner to wait until the counterclaim is tried, is actually a compelling reason why the Iowa judgment should be reviewed now. In effect, what Respondent urges is that the Iowa courts must hear and resolve an issue involving the merits of the grievances Petitioner sought to bring to an arbitrator. Were Respondent's procedural suggestions to prevail, the arbitrator could sit *only after the Iowa courts had reviewed the merits.* By categorizing the Iowa judgment as not final,

Respondent thus seeks to accomplish by indirection precisely what this Court has repeatedly announced should not be countenanced. If a court, when presented with a Section 301 suit to compel arbitration, must refrain from considering the merits on the theory that the parties have contracted for a decision by an arbitrator, surely the simple filing of a counterclaim for damages for breach of a no-strike clause cannot justify the court's hearing the merits prior to sending the grievances to arbitration. The policy embodied in *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960), ought not be subject to circumvention so readily.

Moreover, Respondent's discussion of principles of Iowa procedure fails to take into account just what the Supreme Court of Iowa actually decided. The decision in the trial court was reached on Respondent's application for a ruling that Petitioner "is not entitled to the relief asked for the reason that it appears by the pleadings herein that any right to enforce the grievance and arbitration provisions of the contract . . . has been waived by [Petitioner] by . . . engaging in a 'walkout' in violation of the contract . . ." (R. 41-42). The trial court stated the issue as follows (R. 48): The "second point of law is that [Petitioner] has waived its right to arbitrate by . . . 1. Indulging in a walkout and picketing in violation of the terms of its contract . . ." In deciding that issue, the trial court ruled that "as a matter of law . . . [Petitioner] has waived its right to arbitration in this case by electing the walkout or strike . . ." (R. 50). The court then added the following paragraph (R. 50):

> The ruling of the Court sustaining defendant's contention in its application for ruling on law points hereinabove stated, constitutes a *final order* on the

points so ruled upon. Since the ruling does not dispose of the whole case, however, it is interlocutory for the purposes of appeal (Emphasis added).*

The Supreme Court of Iowa affirmed the order of the trial court. Specifically, it held that "the trial court was correct in holding the Union had waived its right to arbitrate the grievances filed by its walkout" (R. 59). The cause was remanded "for further proceedings pending therein" (R. 59).

The only matter pending, of course, was Respondent's counterclaim. The final order of the trial court, as affirmed by the Supreme Court of Iowa, put an end to Petitioner's petition seeking an order to compel arbitration. To all intents and purposes the petition was denied, if not formally dismissed, and any future relief under the petition could come only by way of some "means to reopen" or a motion for "new trial" or for "reconsideration of the earlier rulings of law", as Respondent concedes (Brief, pp. 16-17).

These detours to relief would be available, on Respondent's theory, only after "an evidentiary hearing on the counterclaim. . . ." (Brief, p. 18). Thus, although courts are not to consider the merits of grievances when the parties contract for arbitration, the hearing of evidence on what Respondent characterizes as "intimately related" issues (Brief, p. 18) is a precondition for Petitioner's seeking to have the Iowa courts reconsider what they have

* The trial court thus entered "an appropriate final order before trial of the remaining issues, adjudicating the point so determined . . ." in accordance with the express provisions of Rule 105 of the Iowa Rules of Civil Procedure (reprinted in Respondent's Brief, p. 3). The wording of the Rule indicates clearly that it is intended as a means of *finally* disposing of issues before trial. The disposition of an issue is no less final simply because other issues remain. The interlocutory character of the disposition relates to its appealability. Cf. Rule 332(a) of the Iowa Rules of Civil Procedure (reprinted in Respondent's Brief, p. 3).

done. Respondent insists, therefore, that the Iowa courts must do *first* what this Court has suggested that courts in Section 301 cases to compel arbitration should not do at all.

While technically the issue may not be one of jurisdiction, it certainly touches upon a strong policy against judicial participation. Conceivably, after hearing the counterclaim, the Iowa courts might determine that arbitration should have been ordered in the first place. The interim proceedings determinative of the counterclaim, therefore, might in time lead the Iowa courts to the right result on Petitioner's original petition.

To argue that this remote prospect robs the Iowa judgment of finality is to say that so long as hope of discretionary judicial reconsideration remains no order is final. In this sense, of course, the temporary injunction in *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U. S. 542 (1963), was not final either.

Respondent apparently would make the arbitration of grievances growing out of a strike or walkout dependent upon judicial proof that the union did not violate the no-strike clause. Actually, however, the right to arbitrate does not ordinarily depend upon establishing the absence of such violation. There are more issues in the grievances involved here than simply the question of whether Petitioner or the employees violated the agreement. Even if there were found to be a breach of contract, only the arbitrator could decide whether discharge was an appropriate penalty. *International Moulders* v. *Susquehanna Casting Co.*, 283 F. 2d 80, 81 (C. A. 3d 1960). Petitioner could lose the counterclaim and yet be entitled to arbitrate the grievances. Respondent leaves no room for this possibility. It can hardly argue that the Iowa courts would be receptive to Petitioner's plea to reopen the petition to compel arbitration even after a trial had resulted in a judgment in Respondent's favor on the counterclaim.

Furthermore, insofar as the argument offers hope to Petitioner only after the conclusion of proceedings on the counterclaim, it necessarily leaves the fate of possible arbitration entirely in Respondent's hands. Respondent could decide at any time to abandon its counterclaim. In that event it is difficult to see what remedy, if any, Petitioner would have. On Respondent's theory Petitioner's only recourse would be to insist on a trial of the counterclaim for the sole purpose of proving facts upon which to base a plea to the Iowa courts to reconsider their decision that Petitioner's right to arbitrate had been waived. Pushed to this extreme, Respondent's suggested procedure borders on the ridiculous.

II.

THERE ARE NO PERTINENT FACTS WITH RESPECT TO THE ALLEGED STRIKE WHICH ARE NOT DISPUTED. THE ISSUE RAISED BY RESPONDENT'S DEFENSE OF A STRIKE IN VIOLATION OF CONTRACT IS FULLY PRESENTED BY THE PLEADINGS.

Respondent argues (Brief, pp. 32-35) that Petitioner made certain "critical admissions" in the pleadings which justified the trial court in finding "an obvious, intentional, and severe violation" of the no-strike provisions of the collective agreement. The argument rests, almost in its entirety, on the assertion that, despite the requirement of the Iowa Rules of Civil Procedure, Petitioner failed to reply to an amendment to Respondent's Answer and that such failure constituted an admission of the facts alleged. This contention distorts the pleadings; it also ignores decisions of the Supreme Court of Iowa with regard to the function of a reply.

The pleadings below consisted of the following: 1) the Petition in Equity (R. 1-6), to which were attached the collective bargaining agreement (R. 7-21), the grievances (R.

22-24), and certain correspondence between the parties (R. 25-29); 2) the Answer, Affirmative Defenses, Legal Defenses, and Counterclaim (R. 39); 3) the Amendment to Petition (R. 39-40); 4) Respondent's Answer to Plaintiff's Amendment to Petition (R. 40-41), which is somewhat misleadingly referred to as an "amended answer" in Respondent's Brief (p. 32); 5) the Reply and Answer to Counterclaim (R. 34-39); and 6) the Application to the Court to hear and determine points of law raised in the pleadings (R. 41-42).

The Amendment to the Petition (R. 39-40) was concerned with altering allegations in the Petition concerning the dates of the employee discharges; the Petition alleged that the employees were discharged on or about May 17, 1961 (R. 3), while the amendment alleges that one employee was discharged on or about May 11, 1961 and that 190 other employees were discharged on or about June 26, 1961 (R. 39-40). These dates were possibly significant in light of Respondent's First Legal Defense (R. 32-33), which asserted that the grievances were not timely since presented more than fourteen days after the occurrences.

The issue framed by the Amendment to Petition related principally to the *timeliness of the grievances*, and, in filing its Answer to Plaintiff's Amendment to Petition (R. 40-41), Respondent so treated it. Concerning the allegation that one employee, Anton Stamoulis, was discharged on or about May 11, 1961, Respondent answered that that employee "left the defendant's premises and refused to proceed further with the grievance . . . and waived any further right to process the said grievance" (R. 40). With regard to the allegation that on or about June 26, 1961 it discharged 190 other employees, Respondent denied the discharges and alleged that on May 11, 1961 "said 190 persons and . . . Anton Stamoulis left their jobs and the premises of defendant after being each notified that said action was a

breach of contract" (R. 41). After some elaboration on the events which took place subsequent to May 11, 1961, Respondent denied that it "took any action on or about June 26, 1961 to discharge the said employees . . ." and asserted that the 191 employees "ceased to be employees" by their own voluntary actions (R. 41).

Thus the allegations in the Answer to Plaintiff's Amendment to Petition, which are relied upon so extensively in Respondent's Brief (pp. 5-6, 13, 32-35), were directed to the crucial question of whether there were discharges and, if so, when they occurred. The issue of the discharges of Anton Stamoulis and the other 190 employees—and of the time of such discharges—was fully presented in Petitioner's Amendment to the Petition and Respondent's Answer. As to that issue nothing needed saying by way of Reply.

Respondent's Brief (pp. 32-33), however, employs the allegations of its Answer to the Amendment to Petition as though they pleaded the key facts concerning the strike. The circumstance that Petitioner did not reply to them is thus taken as a critical admission (Brief, p. 34). Actually, though, the strike, its duration, the picketing, the claim that the strike constituted a breach of contract, and the assertion that Petitioner's conduct justified Respondent's "terminating its obligations" and constituted a waiver of any right to proceed with the grievances were pleaded by Respondent as its First, Second, and Third Affirmative Defenses (R. 31-32). These allegations were met by Petitioner's Reply (R. 34-36). With respect to the claim that there was a strike, Petitioner denied that it struck or set up a picket line, admitted that "certain of defendant's employees.... left their jobs at defendant's plant on or about May 11, 1961", pleaded justification for what the employees did, and denied that Petitioner "authorized any such action . . ." (R. 34).

Clearly, therefore, the issues urged by Respondent based on the claim of a strike, breach of contract, justification for Respondent's treating its obligations as terminated, and Petitioner's waiver of the right to arbitrate were fully pleaded by the affirmative defenses in Respondent's Answer and by Petitioner's Reply to those defenses. Insofar as further allegations in Respondent's Answer to Amendment to Petition may be said to have related to those issues, they added mere embellishment. The issues were posed more than adequately by the Answer and the Reply.

The Iowa Supreme Court has repeatedly held that in such circumstances, where an issue is framed by the pleadings, no further pleading is necessary. ". . . [T]he purpose of a reply is to complete the issues." *Shalla* v. *Shalla*, 237 Iowa 752, 764; 23 N. W. 2d 814, 820 (1946). "If the facts stated in the petition contradict facts stated in the answer, the issues are joined without the necessity of a reply." *Federated Mutual Implement & Hardware Ins. Co.*, 252 Iowa 1208, 1218; 110 N. W. 2d 264, 270 (1961). See also *Verlinden* v. *Godberson*, 238 Iowa 161; 25 N. W. 2d 347 (1947); *Dawson* v. *Laufersweiler*, 241 Iowa 850, 43 N. W. 2d 726 (1950); *Bash* v. *Hade*, 244 Iowa 272, 55 N. W. 2d 278 (1953); *Henderson* v. *Hawkeye-Security Ins. Co.*, 252 Iowa 97, 106 N. W. 2d 86 (1960).

These decisions make it clear that the Iowa courts do not insist upon a formal denial of allegations where the issue to which the allegations relate is already adequately framed by the pleadings. The test is whether any *new issues* are raised in the answer; if not, the mere fact that allegations in the answer are not formally denied in a pleading denominated a reply is of no significance. *State ex rel., Kuble* v. *Capital Benefit Ass'n*, 237 Iowa 363, 21 N. W. 2d 890 (1946).

There is a further reason why Respondent's present em-

phasis upon Petitioner's "critical admissions" is misplaced. Respondent's application to the trial court to determine points of law does not rely upon, or even mention, Petitioner's supposed failure to reply to the allegations upon which so much weight is now placed. It simply contends, among other things, that Petitioner waived its right to enforce the grievance and arbitration provisions of the agreement by "engaging in a 'walkout' in violation of the contract, instead of relying on the agreement to arbitrate" (R. 42). Petitioner admitted that certain employees left their jobs (R. 34). The trial court referred to the "walkout", noted the undisputed fact that it did take place (R. 48-49), and concluded "that plaintiff has waived its right to arbitration in this case by electing the walkout or strike . . ." (R. 50). The Supreme Court of Iowa summarized Respondent's point of law in these words: "Plaintiff not entitled to relief since it has waived the right to enforce arbitration provision, by the walkout . . ." (R. 56). It ruled that "the trial court was correct in holding the Union had waived its right to arbitrate the grievances filed by its walkout" (R. 59).

In short, the issue framed by Respondent's own application to the trial court, which the trial court decided, centered upon the "walkout", *a walkout which Petitioner conceded.* At no point in the trial court did Respondent raise the point, or seek to take advantage of it, that Petitioner had not replied to the allegations of fact contained in Respondent's Answer to Petitioner's Amendment to Petition.

Having failed to raise in the trial court Petitioner's failure to file a further reply, Respondent cannot take advantage of the absence of a formal denial on appeal. *Banks v. Carrell*, 241 Iowa 786, 43 N. W. 2d 142 (1950); cf. *Federated Mutual Implement & Hardware Ins. Co.*, 252

Iowa 1208, 110 N. W. 2d 264 (1961). Respondent's attempt in this Court to construe the pleadings in such fashion as to disclose an admission of an intentional breach of contract is not in order.

III.

IN THE ABSENCE OF CONTRACTUAL LANGUAGE EXCLUDING THE GRIEVANCES FROM THE PROVISIONS OF THE ARBITRATION CLAUSE, ONLY THE MOST UNEQUIVOCAL INDICATION OF TOTAL REPUDIATION OF THE CONTRACT WOULD WARRANT A COURT'S REFUSING TO ORDER ARBITRATION. THE EFFECTS OF THE CLAIMED STRIKE ARE FOR THE ARBITRATOR TO DECIDE.

1. At times Respondent's Brief (pp. 18-31) reads as though Respondent assumes that Petitioner is seeking a determination that *all issues* arising out of a strike must be submitted to arbitration. Thus Respondent points to the undesirable consequences which might flow from "an absolute restriction preventing the employer from enforcing his contractual guarantee of freedom from strikes except through the mechanics of arbitration . . ." (Brief, p. 22). The very caption of Point II of Respondent's Brief—"This Court Has Not Held that an Employer Will Always Be Compelled to Arbitrate the Breach of a No-Strike Clause" (p. 18)—suggests that Respondent believes that a reversal of the Supreme Court of Iowa requires holding that "an employer will always be compelled to arbitrate" such a breach.

Petitioner's argument does not lead to that conclusion. As stated in Petitioner's Brief (p. 22), even if Respondent were "compelled to arbitrate," it could still "press its claim for damages for breach of contract." For, clearly, the arbitration clause in the present case is not so broad or all-inclusive as that in *Drake Bakeries, Inc.* v. *Local 50,*

American Bakery and Confectionery Workers, 370 U. S. 254 (1962). At no point has Petitioner asserted that Respondent must *arbitrate* its claim for damages. On the contrary, Petitioner has at all times emphasized that Respondent's contractual remedy, namely, a suit for breach of contract under Section 301, is available to Respondent, regardless of how an arbitrator might decide the grievances. That judicial remedy is not affected by Petitioner's demand for arbitration, nor will it be affected by a court decision requiring that the pending grievances be submitted to the arbitrator.

Respondent confuses contractual undertakings with remedies available to the parties in the event of breach. No one pretends that a no-strike clause guarantees an employer against strikes; while such a provision may substantially reduce their likelihood, it cannot literally provide an employer with what Respondent describes as a "contractual guarantee of freedom from strikes . . ." (Brief, p. 22). If such a clause is violated by the union, however, the employer has his remedy under Section 301 —an action for damages for breach of contract. An employer may be influenced to enter into a collective agreement by the assurance the no-strike clause gives him, and by his belief that the danger of strikes is thereby substantially diminished, but, if he is realistic, he also necessarily must place reliance upon the remedy available to him in the event the union, notwithstanding its contractual obligation, goes on strike. Here, Respondent has a counterclaim for damages pending in the Iowa courts (R. 33). At least in part, that is what Respondent bargained for.

Having intimated, erroneously, that Petitioner's position requires it to urge that only an arbitrator can decide "whether or not the union has fulfilled its contract obligation to refrain from a strike" (Respondent's Brief, p. 18), Respondent seemingly also contends that the present

arbitration clause, which leaves to the employer his right to sue for breach of contract (unlike the provision in *Drake Bakeries*), is evidence that "the scope of the arbitration clause does not reach to embrace walkouts or strikes amounting to a substantial breach" (Brief, p. 25). It is difficult to see how the employer's retention of his right to sue evidences anything more than his unwillingness to have an arbitrator decide whether or not, in the event of a strike, he is entitled to damages. In contrast to the employer in *Drake Bakeries*, Respondent wanted the right to go to court for damages for breach of the no-strike clause. That right he has.

The retention and exercise of that right, however, do not diminish the scope of arbitration of grievances growing out of a walkout or a strike. The question of what must be submitted to arbitration depends upon the terms of the arbitration clause; if the clause contains the usual language regarding a dispute "with reference to the proper interpretation or application of the provisions of this contract," there must be express exclusionary language to justify determining that a dispute on its face involving the interpretation or application of the provisions of the contract is not arbitrable. Here the contract (R. 19) contains the usual language, as did the contracts in the *Steelworkers* cases.*

Further, there is no express exclusion of discharge cases growing out of a strike situation. Respondent seeks to imply such an exclusion from its refusal to "bargain away" its right to sue for damages for violation of the no-strike clause. This Court has determined, however, that "[a]part from matters that the parties *specifically exclude*, all of

* *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 565; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 576; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 594.

the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions. . . ." (Emphasis added.) *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960).

The Court of Appeals in *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F. 2d 217, 219 (C. A. 4th 1963), cert. den. 11 L. Ed. 2d 53 (1963), considered significant the absence of a specific exclusion:

> . . . [S]ince discharges for engaging in strikes have not been explicitly excluded from the coverage of the arbitration agreement, we are not persuaded that the discharges in issue are not "[g]rievances arising out of the operation and interpretation of this [collective bargaining] agreement involving wages . . . hours, or other conditions of employment . . ."

2. Respondent also appears to believe that Petitioner would relieve the courts "of any obligation to resolve the issue of arbitrability . . ." (Brief, p. 29). This is plainly not so. Petitioner argued in its Brief (pp. 12-14) that the role of a court confronted with a suit to compel a reluctant party to arbitrate is a restricted one, which requires it to avoid entanglement in the merits of the grievance. This argument does not deprive the court of its right, initially, to determine arbitrability. It does, of course, emphasize that "the function of the court is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 567-68 (1960).

Respondent's approach requires a court to abandon that limited role. It would have the court look beyond the provisions of the contract and decide not only whether the walkout or strike amounted to a "substantial breach," but also whether the employer thereupon "repudiated its col-

lective bargaining obligations, unequivocally and in full . . ." (Brief, pp. 25, 27). The difficulty with this position is that almost inevitably it results in the court's involvement in the merits of a grievance which arises in the context of a strike.

There may be situations, however infrequent, in which parties to a contract have so completely repudiated all dealings with each other that no shred of the agreement survives. But collective bargaining in contemporary American industry anticipates something more than a transient relationship. Whatever may be the situation with commercial contracts, a collective bargaining agreement between an employer and a union is not to be viewed, and the parties ordinarily do not regard it, as mere surplus cargo to be jettisoned at the first blow of stormy industrial weather. There must be literally hundreds of collective bargaining agreements in effect today which have survived lengthy strikes, lawsuits, monetary judgments against unions, and innumerable arbitration awards. Even if the facts surrounding a labor-management dispute were to lead inescapably to the conclusion that total breach had occurred, it does not follow that the arbitration clause could not survive. Cf. *Drake Bakeries* v. *Local 50, American Bakery & Confectionery Workers Int'l, AFL-CIO*, 370 U. S. 254, 262-63 (1962).

In any event, once it is determined that the arbitration clause is "susceptible of an interpretation that covers the asserted dispute," *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960), the crucial question is: *who is to decide* that there has been a substantial or total breach, or an unequivocal repudiation of collective bargaining obligations, or a willingness on the part of the employer "to cast off the contract and sever all relations with the union. . ." (Respondent's Brief, p.

27). For Petitioner to urge that in all but the most unlikely case these questions are for the arbitrator is not to argue that "the question of arbitrability is excluded from judicial determination" (Respondent's Brief, p. 12). Rather, it is to limit the judicial function to what this Court has viewed it to be and to implement the policy of keeping courts from becoming enmeshed in the merits of grievances.

In the present case, Respondent is entitled to argue, and to introduce evidence to support its contentions that: 1) the union engaged in a strike in violation of its contractual commitment; 2) that the strike justified Respondent in discharging a number of employees; 3) that the conduct of Petitioner and the employees constituted so complete a destruction of the contract relationship as to warrant Respondent in treating the contract at an end and as no longer imposing on it any obligation to arbitrate; and 4) that the acts of Petitioner constituted a waiver of its contractual rights to require arbitration of the discharges.

The fundamental question upon which Petitioner and Respondent differ has to do with *who is to hear and decide Respondent's contentions*. Respondent claims that the court must decide them because they are part of the judicial issue of arbitrability. Petitioner claims that the arbitrator must decide them because the parties have contracted for arbitration of disputes having to do with "the proper interpretation or application of the provisions of [the] contract. . ."

What is particularly significant about Respondent's contentions is that they are put forward *both* as defenses to the merits of the grievances *and* as defenses to Petitioner's claim that the grievances should be arbitrated. It would require judicial tight-rope walking of a very high order to decide Respondent's defenses to the demand for arbitration

without at the same time considering the merits of the grievances. This Court has instructed the lower courts to avoid becoming "entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause. . ." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 585 (1960). Is it not equally important for the lower courts to avoid such entanglement even through the back gate of weighing acts and statements of parties engaged in a fast-breaking industrial altercation? An altercation leading, according to one side, to a total break of all relations between the parties, and according to the other, to improper employee discharges?

3. Respondent endeavors to employ the criteria announced in *Drake Bakeries* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 257, 261 (1962), to support the view of the Iowa Court that arbitration was not required. As applied to the facts here, these indicia do not lead to the result Respondent seeks.

First, so far as the "scope of the commitment to arbitrate" (Respondent's Brief, p. 25) is concerned, the contract provision here is broad and there is no exclusionary clause of any kind (R. 18-20).

Second, "the employer's actions following breach of the no-strike provision" do not support the conclusion that Respondent "repudiated its collective bargaining obligations, unequivocally and in full. . ." (Brief, pp. 25, 27). Presumably, on Respondent's view, its filing a counterclaim for damages is not an indication that in any respect it affirms the contract (cf. Respondent's Brief, pp. 25-26). The facts upon which Respondent seeks to rest the conclusion of total repudiation are set forth entirely in its Answer to Plaintiff's Amendment to Petition (R. 40-41); as indicated in Point II above, Respondent is not entitled to treat

these allegations as though undenied. Furthermore, even if the allegations of paragraph 2 of that pleading (R. 41) are taken to be literally true, they do not say anything, even by way of conclusion, to the effect that Respondent repudiated or cast off the contract or severed all relations with the union. According to Respondent's version, as pleaded, it took no express action to discharge the employees; rather, the men ceased to be employees by reason of their own voluntary refusals to accept an offer to return. All this, and the decision to fill the employees' jobs by permanent replacements, took place, according to the Respondent's version (R. 41) on May 15, 1961—or precisely four days after the men are claimed to have walked out.

Third, in this context it is not clear what Respondent means by asserting that the strike "was of extended duration" (Brief, p. 28). If the employees ceased to be employees of Respondent on May 15, 1961 and were permanently replaced, their continuing to protest and picket does not convert a four-day strike into a protracted one. In light of Respondent's pleading, it might properly be suggested that, commencing on May 15, 1961, the employees were locked out. Taking the facts as Respondent alleges them, therefore, Respondent's view is that a four-day walkout justifies total repudiation of the contract, while a one-day walkout would not.

It could be, of course, that if the full background of the dispute were ever heard—as it could be before an arbitrator—the events of May 1961 might not be so one-sided as Respondent's pleading suggests. The special competence of an arbitrator, once his services were brought to bear on the dispute, could lead to resolutions—favorable to the continuation of collective bargaining between the parties—which, on the bare record before the Iowa courts and this Court, might seem improbable. The end result might be

a return of the employees to their jobs, a resumption of dealings between the union and the employer, and a continuing effort by Respondent to convert its counterclaim into the balm of monetary damages. If every three- or four-day walkout put a permanent end to labor-management relations between the parties, many agreements would never live out their terms. The preferred course must be arbitration and reconciliation, not an unending state of cold war.

The strikes in *Drake Bakeries, supra,* in *Retail, Wholesale and Department Store Union, Local 1065* v. *Vaughn's Sanitary Bakery, Inc.*, 196 F. Supp. 633 (M. D. Pa. 1961), and in *International Moulders & Foundry Workers* v. *Susquehanna Casting Co.*, 283 F. 2d 80 (1960); were one-day affairs. There had been a walkout or work stoppage in *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 595 (1960); arbitration was nonetheless ordered. In *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), despite a context of numerous work stoppages and strikes over a period of many months, it appears to have been contemplated by the parties that fourteen grievances would be arbitrated. In *Local 748, International Union of Electrical, Radio and Machine Workers* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (C. A. 6th 1963), a month and a half elapsed between the commencement of the strike and the employer's advising the employees who were still striking that they were discharged. And in *Armstrong-Norwalk Rubber Corp.* v. *United Rubber Workers, Local 283*, 167 F. Supp. 817 (D. C. Conn.), the strike lasted five weeks and substantially stopped production.

It is not likely that a sensible rule could be devised which would make arbitrability depend, in a strike situation, upon the number of days the strikers were out. In some instances a three-hour stoppage is more serious than a three-day walkout. Some employers, in times of declining sales,

view a strike with the greatest equanimity, though at other times it would mean a real economic pinch. Surely the better practice would be to leave the effect and the cause of a claimed strike, *insofar as they relate to the merit or lack of merit of the grievances*, to the arbitrator.

Respondent insists that the court, initially and as part of its task of determining arbitrability, must pass upon the effect of the strike. As Respondent states it, "the governing issue before the Iowa courts was the propriety of the employer's repudiation of a collective bargaining contract, including its arbitration provisions" (Brief, p. 31). But Respondent does not explain how a court could rule upon that question without reaching the merits of the grievances. Surely a four-day strike is not the occasion to weaken the injunction that in suits to compel arbitration "courts . . . have no business weighing the merits . . ." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960).

CONCLUSION.

For the foregoing reasons, Petitioner urges that the decision of the Supreme Court of Iowa be reversed.

Respectfully submitted,

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